(17)

No. 120 ORIGINAL

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* WESTERN MOHEGAN TRIBE & NATION OF NEW YORK IN SUPPORT OF NEITHER PARTY

LEON GREENBERG
Counsel of Record
244 Rock Hill Drive
Box 757
Rock Hill, New York 12775
(914) 791-4700 fax 791-1642

31 PP

MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF *AMICUS CURIAE*

Western Mohegan Tribe & Nation of New York respectfully seeks leave of the Court to file the following *amicus* brief out-of-time on the ground that the applicant has been trying to do so since 6 February 1997 but only today was able to obtain counsel of record to perfect the filing, and unless the applicant does appear the Court may be suborned by the parties into complicity in genocide contrary to the law that the amicus has to place before the Court and that in the absence of the *amicus* will be concealed from the Court.

October 20, 1997.

WESTERN MOHEGAN TRIBE & NATION OF NEW YORK

By:

RONALD ROBERTS
Sachem

BRUCE CLARK, LL.B., M.A., Ph.D.
Attorney General

/s/ Leon Greenberg
LEON GREENBERG
Counsel of Record

QUESTION FOR CONSIDERATION

Is it legal for the *amicus* to dispute the Special Master's assumption on page 4 of the *Final Report* that the Dutch Indian purchase of 1630 A.D. was valid and, if so, can the *amicus* seek, as a fourth sovereign body politic interested or affected, to avail itself of the remedy of third-party adjudication recognized by the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*?

TABLE OF CONTENTS

BASIS FOR JURISDICTION IN THIS COURT

Pursuant to Rules 17, 24 and 33(1)(g)(xi) and 37.4 this brief is filed at the Exceptions Stage in response to the Final Report of the Special Master dated March 31, 1997 in the matter of *New Jersey v. New York*, 115 S. Ct. 309 (1994). *Amicus* claims to be an Indian "*domestic dependent nation*" part of whose allegedly unceded aboriginal territory is the subject of this action: Ellis Island. As a matter of law alone, if Ellis Island is indeed unceded it is automatically a "*Territory, or Possession*" of the United States within the meaning of Rule 37.4. Therefore, *amicus* is entitled to seek leave to file this brief by its "*Attorney General*" as of right and without the consent of the parties.

CONSTITUTIONAL PROVISIONS

Appendix "A." Page 5a.

STATEMENT OF THE CASE

Ellis Island is within the Hudson River drainage basin claimed by Western Mohegan Tribe & Nation of New York as set forth in Appendix "A."

The issue of outstanding aboriginal rights has not been adjudicated and is not *res judicata* relative to Ellis Island.

SUMMARY OF THE ARGUMENT

Appendix "A." Page 18a.

RELIEF REQUESTED

Wherefore the *amicus* respectfully asks the Court to stipulate that its judgment as between the interests of New Jersey and New York is without prejudice to the interests of the *amicus* as *cestui que trust* and of the United States of America as trustee.

October 20, 1997.

WESTERN MOHEGAN TRIBE &
NATION OF NEW YORK

By:

RONALD ROBERTS
Sachem

BRUCE CLARK, LL.B., M.A., Ph.D.
Attorney General

LEON GREENBERG
Counsel of Record

TO:

JOSEPH L. YANNOTTI
Assistant Attorney General, New Jersey
25 Market Street, CN 112
Trenton, NJ 08625 (609) 292-8567 Fax 777-3120

JUDITH KRAMER
Assistant Attorney General, New York
24th Floor, 120 Broadway Avenue
New York, NY 10271 (212) 416-8603 Fax 416-6009

CRAIG ALEXANDER
Assistant Attorney General, United States
Office of Tribal Justice, Department of Justice
Room 1509
950 Pennsylvania Avenue NW
Washington, DC 20530--0001
Telephone (202) 514-9080 Fax (202) 514-

Appendix

NO. ___ ORGINAL

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

WESTERN MOHEGAN TRIBE & NATION OF NEW YORK,

Applicant
(Plaintiff),

v.

UNITED STATES OF AMERICA,
STATE OF NEW JERSEY,
STATE OF NEW YORK,

Respondents
(Defendants).

MOTION SEEKING LEAVE TO INVOKE THE COURT'S ORIGINAL JURISDICTION SO AS TO OBTAIN DECLARATORY RELIEF RELATIVE TO AN OUTSTANDING JURISDICTIONAL CONFLICT BETWEEN THE PARTIES AND BILL OF COMPLAINT

LEON GREENBERG
Counsel of Record
244 Rock Hill Drive
Box 757
Rock Hill, New York 12775
(914) 791-4700 fax 791-1642

APPLICATION FOR LEAVE

The applicant respectfully moves for an order granting to the applicant, as against the defendants, leave to appear as a plaintiff invoking the Court's original jurisdiction relative to the case or controversy defined herein and, if leave be granted, does file the following as the plaintiff's complaint.

October 20, 1997. WESTERN MOHEGAN TRIBE & NATION OF NEW YORK

By:
RONALD ROBERTS
Sachem

BRUCE CLARK, LLB, MA, PhD
Attorney General

LEON GREENBERG
Counsel of Record

QUESTIONS FOR CONSIDERATION

Does the plaintiff suing by its sachem and attorney general as "*public Ministers*" within the meaning of Section 2.2 of Article III of the *Constitution, 1789* have *locus standi* to apply for an exercise of the Court's "*original Jurisdiction*" in relation to the conflicting claim to jurisdiction over the Hudson River drainage basin as between the plaintiff on the one hand, and the three defendants on the other hand?

If so, should the Court specifically exercise such "*original Jurisdiction*" specifically by declaring that the plaintiff still enjoys the legal remedy of third-party adjudication as settled by the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*, relative to the case or controversy defined herein.

Thirdly, does the President of the United States, pursuant to Section 2.2 of Article II of the *Constitution*, and regardless of the (purported) repeal of such Section by the *Act of March 3, 1871*, c. 120, § 1, 16 Stat. 566, still have jurisdiction to settle with the plaintiff, such as by signing a Treaty such as appears in the Appendix hereto, relative to any and all outstanding issues relating to the plaintiff's alleged Indian burden on titles in the Hudson River drainage basin?

TABLE OF CONTENTS

BASIS FOR JURISDICTION IN THIS COURT

The plaintiff asserts that relative to the Hudson River drainage basin it is the "*domestic dependent nation*" within the meaning of *Cherokee Nation v. State of Georgia*, 31 Peters 1, 16 (1831). As such, it is *prima facie* entitled to have in its employ "*public Ministers*" within the meaning of Section 2.2 of Article III of the *Constitution*. That section enacts that *"In all Cases affecting . . . public Ministers . . . and those in which a State shall be a Party; the Supreme Court shall have original Jurisdiction."* Accordingly, by its sachem and its attorney general as "*public Ministers,*" the plaintiff claims a right of access to the Court.

The Court's refusal to concede *locus standi* to the native plaintiff in the said case of *Cherokee Nation v. Georgia* is not necessarily determinative of the *locus standi* of the native plaintiff herein. The Cherokee Nation contended that it enjoyed "*foreign*" nation status. Here, in contrast, the Western Mohegan Tribe & Nation of New York eschews the claim to "*foreign*" nation status and, instead, relies upon a different clause of the *Constitution*, namely that dealing with bodies politic having "*Public Ministers,*" which clause is not concerned with whether the body politic is foreign versus domestic, so long as it is a body politic.

The second distinguishing factor is the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*. It was not addressed in *Cherokee Nation v. Georgia*, but will be here, and that instrument vests in this plaintiff a *sui generis* legal status and remedy, which this plaintiff asks this Court to consider.

CONSTITUTIONAL PROVISIONS

Magna Carta, 1215 established the constitutional law principle that no person or institution is above the law, not

even the head of the government itself and, *a fortiori*, not the courts provided by the government.

The papal bull *Sublimus Deus, 1535* settled the natural and international law status of the natives as human beings invested, as such, with the strictly legal rights of "*liberty*" and "*possession*" as against the newcomers and their governments. It enacted:

> *We . . . consider, however, that the Indians are truly men . . . we define and declare by these letters, or by any translation thereof signed by any notary public and sealed with the seal of any ecclesiastical dignitary, to which the same credit shall be given as to the originals, that notwithstanding whatever may have been said to the contrary, the said Indians . . . are by no means to be deprived of their liberty or the possession of their property . . . ; and that they may and should, freely and legitimately, enjoy their liberty and possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.*

An act for the prevention of frauds and perjuries, 9 Car. II, cap. 3 (1676) (Statutes at Large, Great Britain), established the constitutional law principle that no possessory interest in land, such as conveyed by Indian treaty, may be transferred except upon the written consent of the transferor. It enacted:

> *I. FOR prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subordination of perjury; be it enacted . . . all leases, estates, tenements or hereditaments, made or created by livery and seisen only, or by parol, and not put in writing; and signed by the parties so making or creating the same, or their agents thereunto lawfully*

authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol lease or estates, or any former law or usage, to the contrary notwithstanding.

The *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut* settled that in the absence of such a written and signed Indian treaty (*a*) that it was *ultra vires* colonial legislation unilaterally to revoke the natives' previously established rights of liberty and possession and (*b*) that the natives' legal remedy for attempts at revocation was independent and impartial third-party adjudication (as contrasted with litigation in the courts of the revoking government.) The order in council enacted:

Upon reading this day a Representation from the Lords Comm^rs^ of Trade and Plantations . . . for Erecting a Court within that Colony to do Justice in this matter . . . Her Majesty in Councill approving the said Representation . . .

[which represented: *We Consulted Your Maj^ty's^ Attorney General thereupon, Who has reported to Us:*

'That it doth not appear to him that the Lands now Claimed by the Indians were intended to pass or could pass to the Corporation of the English Colony of Connecticut, or that it was intended to dispossess the Indians, who before and after the Grant were the owners and Possessors of the same, and that therefore what the Corporation hath done by their Act aforementioned, is an apparent injury to the Indians, And that your Majesty, notwithstanding the Powers Granted to

> *that Corporation (there not being any words in the Grant to exclude your Majesty) may lawfully erect a Court within that Colony to do Justice in the matter, And in the Erecting of such Court may reserve an Appeal to your Majesty in Councill, and may command the Governor of that Corporation not to oppress those Indians or deprive them of their Right, But to do them Justice notwithstanding the Act aforesaid, made in Connecticut, to their prejudice, such Act he is of opinion, is illegal and void.'*]
>
> *Her Majesty in Councill approving the said Representation, is pleased to Order and it is hereby Ordered, That the said Lords Commissioners do prepare the Drafts of Letters for Her Majesty's Signature to those Governors together with the Minutes of a Standing Commission to be prepared by Mr Attorney General, as is provided by the said Representation.*

The pre-Revolution constitutional restatement of aboriginal rights law made by the *Royal Proclamation of 1763* recognized and affirmed the aforesaid previously established rights and remedy. Specifically, paragraph 1 of part II of the 1763 restatement recognized and affirmed the 1704 order in council's enactment that the colonial courts had no territorial jurisdiction over yet unpurchased Indian territory. It enacted that the colonial courts' jurisdiction, in general, was to be:

> *. . .under such Regulations and Restrictions as are used in other Colonies. . . ; for which Purpose We have given Power under our Great Seal to the Governors of said Colonies respectively to erect and constitute Courts of Judicature and public Justice within our Said Colonies. . .*

Paragraph 2 of part II of the 1763 restatement recognized and affirmed that territory is not subject to crown jurisdiction prior to purchase (aside, at least, from the jurisdiction to purchase). It referred to the granting power as relating to such lands:

> *. . . as are now or hereafter shall be in Our Power to dispose of.*

Paragraph 1 of part IV of the 1763 restatement defined more specifically what paragraph 2 of part I referred to as lands not "*now*" subject to disposition but which "*hereafter shall be in Our Power to dispose of.*" Thus, paragraph 1 of part IV enacted that:

> *. . . the several Nations or Tribes of Indians . . . should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as not having been ceded to or purchased by Us are reserved to them or any of them as their Hunting Grounds.*

Paragraph 2 of part IV of the 1763 restatement recognized and affirmed that:

> *. . . no Governor . . . do presume upon any Pretence whatever to grant Warrants of Survey or pass any Patents for Lands . . . upon any Lands whatever which not having been ceded to or purchased by Us as aforesaid are reserved to the said Indians or any of them.*

Paragraph 3 of part IV of the 1763 restatement recognized and affirmed that:

> *We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves . . . upon any Lands within the Countries above described or upon any other Lands*

which not having been ceded to or purchased by Us are still reserved to the said Indians as aforesaid forthwith to remove themselves from such Settlements.

Paragraph 4 of part IV of the 1763 restatement recognized and affirmed that:

. . . if at any Time any of the said Indians should be inclined to dispose of the said Lands the same shall be Purchased . . . at some public Meeting or Assembly of the said Indians to be held for that Purpose . . .

Paragraph 5 of part IV of the 1763 restatement recognized and affirmed that:

. . . the Trade with the said Indians shall be free and open to all our Subjects whatever provided that every Person who may incline to Trade with the said Indians do take out a Licence for carrying on such Trade from the Governor.

Paragraph 6 of part IV of the 1763 restatement recognized and affirmed one exception to the general rule precluding colonial court jurisdiction relative to the Indian territories. It enacted:

And we do further expressly enjoin and require all Officers whatever, as well Military as those employed in the Management and Direction of Indian Affairs within the Territories reserved for the Indians to seize and apprehend all Persons whatever who standing charged with Treason Misprisions of Treason Murders or other Felonies or Misdemeanors shall fly from Justice and take Refuge in the said Territory and to send them under a proper guard to the Colony where the Crime was committed of they stand accused in order to take their Trial for the same.

The said reference in paragraph 6 of part IV of the restatement to "*Misprisions of Treason*" is explained by Blackstone's *Commentaries*, 1825, IV: 74-5, 119-22:

> *Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consists in the commission of something which ought not to be done. . . . CONTEMPTS against the king's prerogative. As, by . . . disobeying the king's lawful commands; whether by writs issuing out of his courts of justice,...or proclamation, . . . Disobedience to any of these commands is a high misprision and contempt; . . .*

Thus, breach by a colonial official of the 1763 proclamation was *misprision of treason* without proof of *mens rea*.

Campbell v. Hall (1774), 98 English Reports 848, 895-9 (Judicial Committee of the Privy Council):

> *. . . laws of a conquered country continue until they are altered by the conqueror. . . . he* [the king] *can make none which are contrary to fundamental principles; . . . he cannot change the laws himself without consent of Parliament. . . . King* [*Magna Carta*] *John himself could not alter the grant of the laws of England. . . .The first and material instrument is the proclamation of the 7th of October 1763. See what it is that the King says, and with what view he says it; how and to what he engages himself and pledges his word,. . .*

Sections 8.1 and 8.3 of Article I of the *Constitution, 1789* invested in Congress jurisdiction to "*provide for the common Defence and general Welfare of the United States*" and "*To*

regulate Commerce with foreign Nations and among the several States, and with the Indian tribes."

Section 10 of Article I of the *Constitution, 1789* withheld from all States the jurisdiction to "*enter into any Treaty. . . .*"

Section 1.8 of Article II of the *Constitution, 1789* binds the President under his Oath or Affirmation of Office to "*preserve, protect and defend the Constitution of the United States.*"

Section 2.2 of Article II of the *Constitution, 1789* invested in the President jurisdiction "*to make Treaties, provided two thirds of the Senators present concur.*"

Section 2.2 of Article III of the *Constitution, 1789* enacted that "*In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party; the Supreme Court shall have original Jurisdiction.*"

Section 2.3 of Article III of the *Constitution, 1789* by necessary implication repealed the 1763 proclamation's sanctions for *Misprision of Treason* due to breach of the proclamation. It enacted:

> *Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.*

Cherokee Nation v. Georgia, 31 Peters 1, 16 (1831) held:

> *They may, more correctly perhaps, be denominated domestic dependent nations."*

Worcester v. Georgia, 6 Peter's 515, 541, 544, 546, 549, 560, 581 (1832) held:

> [Discovery] *could not affect the rights of those already in possession . . . It gave the exclusive right to*

purchase, but did not found that right on a denial of the right of the possessor to sell . . . the exclusive right of purchasing such lands as the natives were willing to sell.. . .The Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent. . . . Have the numerous treaties which have been formed with them . . . been nothing more than an idle pageantry? . . . Except by compact we have not even claimed a right of way through Indian lands. . . .

Mitchel v United States, 9 Peter's 711, 745, 746, 749, 755 (1835)held:

[The Indian Nations of America have] *a perpetual right of possession . . .* [which] *could not be taken without their consent . . .* [because] *The King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties. This brings into practical operation another principle of law settled and declared in the case of* Campbell v. Hall *that the proclamation of 1763, which was the law of the provinces ceded by the treaty of 1763, was binding upon the king himself, and that a right once granted by a proclamation could not be annulled by a subsequent. It cannot be necessary to inquire whether these rights secured by a treaty approved by a king are less sacred than under his voluntary proclamation. . . . The proclamation of 1763 was undoubtedly the law of the province till 1783: it gave direct authority to the Governors of Florida to grant crown lands, subject only to such conditions and*

> *restrictions as they or the King might prescribe. These lands were of two descriptions: such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was perpetual possession, and his the ultimate reversion in fee, which passed by the grant, subject to the possessory right. . . This proclamation was also the law of all the North American colonies in relation to crown lands.*

Section 2 of *Amendment XIV* ratified July 9, 1868 enacted that, for the purposes of ascertaining the franchise for Representatives, "*persons*" constitutionally is to be construed as "*excluding Indians not taxed.*"

The *Appropriations Act, 1871*, 25 US § 71, being the *Act of March 3, 1871*, c. 120, § 1, 16 Stat. 566 enacted:

> *No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired.*

The *Convention for the Prevention and Punishment of the Crime of Genocide, 1948* enacted:

> Article II. *In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:* (a) *Killing members of the group;* (b) *Causing serious bodily or mental harm to members of the group;* (c) *Deliberately inflicting on the group conditions of life calculated to*

bring about its physical destruction in whole or in part; (d) *Imposing measures intended to prevent births within the group;* (e) *Forcibly transferring children of the group to another group.* Article III. *The following acts shall be punishable:* (a) *Genocide;* (b) *Conspiracy to commit genocide;* (d) *Attempt to commit genocide;* (e) *Complicity in genocide.* Article IV. *Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.* Article VI. *Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such other international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.*

The *Genocide Convention Implementation Act of 1987 (the Proxmire Act).* P.L. 100-606. 100th Congress. 102 Stat. 3046 enacted:

§ 1091. Genocide "(a) BASIC OFFENSE.—*Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such*—(1) *kills members of that group;* (2) *causes serious bodily injury to members of that group;* (3) *causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;* (4) *subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;*

(5) *imposes measures intended to prevent births within the group; or* (6) *transfers by force children of the group to another group; or attempts to do so, shall be punished as provided in subsection* (b). (b) PUNISHMENT FOR BASIC OFFENSE.—*The punishment for an offence under subsection* (a) *is*—(1) *in the case of an offence under subsection (a)(1), a fine of not more than $1,000,000 and imprisonment for life; and* (2) *a fine of not more than $1,000,000 or imprisonment for not more than twenty years, or both, in any other case.* (d) REQUIRED CIRCUMSTANCES FOR OFFENSES.—*The circumstance referred to in subsections (a) and (c) is that*—(1) *the offense is committed within the United States; or* (2) *the alleged offender is a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)).* § 1092. Exclusive remedies. *Nothing in this chapter shall be construed as precluding the application of State or local laws to the conduct prescribed by this chapter, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding.* § 1093. Definitions. *As used in this chapter*—(2) *the term 'ethnic group' means a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage*; (4) *the term 'members' means the plural*; (5) *the term 'national group' means a set of individuals whose identity as such is distinctive in terms of nationality or national origins*; (6) *the term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent*; (7) *the term 'religious group' means a set of individuals whose identity as such is distinctive in*

terms of common religious creed, beliefs, doctrines, practices, or rituals; and (8) *the term 'substantial part' means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part."*

STATEMENT OF THE CASE

Section 2 of *Amendment XIV* ratified July 9, 1868 confirmed that there remain two categories of American Indians:—"*Indians not taxed*" and, therefore, by necessary implication, *Indians taxed*. The distinguishing factor was, and remains, the existence of an Indian Treaty made by the President pursuant to Section 2.2 of Article II of the *Constitution, 1789*. As confirmed by *Worcester v. Georgia*, 6 Peter's 515, 581 (1832) "*Except by compact we have not even claimed a right of way through Indian lands.*" *A fortiori*, except by compact we can not (constitutionally) claim a right to tax Indians upon Indian lands. Taxation occurs upon the basis of federal and state law which itself is not applicable prior to treaty. Prior to treaty, Indians have no *constitutionally* enforceable right to federal or state benefits; but neither have they the burden of taxation. No taxation without representation.

Pending the contingency of treaty the Indians by operation of constitutional law are independent of the domestic legislation of the United States, but dependent upon the United States for protection from the imposition of jurisdiction by any foreign power. That is how the adjectives "*domestic*" and "*dependent*" are reconciled with their noun "*nations*" as used in *Cherokee Nation v. Georgia* with reference to native bodies politic that have not, by treaty, relinquished their aboriginally established independence (native sovereignty).

Three years after the *14th Amendment* in 1868 re-confirmed the 1832 *Worcester* case's confirmation of the constitutional principle of Indian independence upon untreated-for lands, the *Appropriations Act of 1871* (unconstitutionally) pretended to void the constitutional category "*Indians not taxed*." It did this by enacting:

> *No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty.*

In sum, the constitutional quality of being "*independent*" was (supposedly) repealed by ordinary domestic legislation, which is a legal impossibility. Ostensibly, the 1871 statute rendered *all* Indians and *all* their lands *prima facie* subject to domestic legislation of general application. This, then, is the origin the constitutional oxymoron of Congressional "*plenary*" jurisdiction relative to those American Indians who have not by treaty relinquished their aboriginally vested sovereignty as guaranteed under international and constitutional law. In the aboriginal rights and remedies context the adjective "*plenary*" is a recent invention based, ultimately, upon the patently unconstitutional *Appropriations Act of 1871*.

SUMMARY OF THE ARGUMENT

The presumptive existence since 1535 of the plaintiff's *prima facie* natural, international and constitutional law rights of "*liberty*" and "*possession*" and the related legal remedy of third-party adjudication is settled by the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*.

The post-Revolution constitutional law of the United States of America is consistent with the continuity of those rights and that remedy.

Modern federal Indian law, however, is premised upon the (erroneous) assumption that the federal *Appropriations Act of 1871* repealed the previously established constitutional law jurisdiction of the President to make treaties with the Indian nations. The assumption has not heretofore been challenged.

The assumption is erroneous because it assumes that federal law can repeal constitutional law.

That assumption inverts the order of rank and precedence that constitutes the essence of the rule of law. It suborns the President into breaching his obligation to uphold the Constitution as stipulated by Section 1.8 of Article II of the *Constitution, 1789*, specifically by requiring him to implement the 1871 federal law precluding Indian treaties over the conflicting 1789 constitutional law authorizing Indian treaties.

Sublimus Deus, 1535 recognized the plaintiff's right of liberty and possession pending treaty of purchase. The *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut* recognized the plaintiff's legal remedy of third-party adjudication. The *Royal Proclamation of 1763* confirmed both the right and the remedy, and added the crime of misprision of treason for interference. The *Constitution* repealed the crime of misprision of treason. *Cherokee Nation v. State of Georgia*, 31 Peters 1 (1831), *Worcester v. State of Georgia*, 5 Peters 1 (1832) and *Mitchel v United States*, 9 Peter's 711 (1835) settled that the Revolution and *Constitution* are without prejudice to the native interest as vested in the British era.

Since it was not in 1704 a party to *Mohegan Indians v. Connecticut*, the native nation plaintiff in *Cherokee Nation v. Georgia* in 1831 could not and did not cite and rely upon the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*. For this reason the

Cherokee Nation case is distinguishable in respects other than that bearing upon the general definition of "*domestic dependent nation*" status.

The Court has not revisited the court jurisdiction issue since the *Cherokee Nation* case of 1831; nor could the Court have repealed the previously established law relative to the plaintiff herein in particular even if it had revisited the issue: *Magna Carta, 1215*; E.V. Dicey, *Lectures,* 1920, p. 483.

Denial or frustration of the plaintiff's previously established legal remedy of third-party adjudication or arbitration arguably results in "*genocide*" within the meaning of the *Convention for the Prevention and Punishment of the Crime of Genocide, 1948*, art. 2(b), 3(e), 4 and 6 as confirmed by the *Genocide Convention Implementation Act of 1987 (the Proxmire Act)*, P.L. 100-606, 100th Congress, 102 Stat. 3046, § 1091(*a*).

The unchallenged *de facto* assumption of jurisdiction by United States courts in other cases in relation to other native nations is not relevant to the constitutional existence of this particular plaintiff's previously established *de jure* remedy.

The principle of the presumptive continuity of previously established rights and remedies is essential to the rule of law in the modern and future world: Smith, *Appeals to the Privy Council,* pp. 417-426.

In 1871 Congress (erroneously) assumed it had jurisdiction to repeal the previously established international and constitutional law. The *Appropriations Act* (unconstitutionally) purported to abolish the treaty process. The express abolition of the treaty process implicitly repealed the rights of liberty and possession and the remedy of third-party party adjudication that the treaty process existed to protect.

The repeal by ordinary domestic legislation of the previously established international and constitutional law axiomatically is *ultra vires* and unconstitutional. Therefore, the *Appropriations Act, 1871* could not, constitutionally, have repealed the plaintiff's aboriginal rights as a "*domestic dependent nation*" to "*liberty*" and "*possession*" relative to the plaintiff's untreated for aboriginal territory. Neither could it have repealed either the plaintiff's attendant aboriginal right to sell the land by treaty. Nor could it have repealed the plaintiff's legal remedy of third-party adjudication relative to the protection of any of those previously established aboriginal rights.

Neither could it have repealed the President's counterbalancing constitutional right under Section 2.2 of Article II "*to make Treaties, provided two thirds of the Senators present concur.*"

Nor could it have repealed the Supreme Court's "*original Jurisdiction*" under Section 2.2 of Article III to re-affirm the plaintiff's previously established remedy of third-party adjudication.

In sum, the jurisdiction of Congress under the references in Sections 8.1 and 8.3 of Article I to "*the common Defence and general Welfare*" and the power "*To regulate Commerce . . . with the Indian tribes*" could not have been employed by Congress, in virtue of the *Appropriations Act of 1871*, either to alter the balance of powers, or unilaterally to negate the plaintiff's previously established and constitutionally protected status as a "*domestic dependent nation*" entitled to treat with the United States as holder of the preemptive right of purchase relative to the plaintiff's "*liberty*" and "*possession*" on its aboriginal territory.

Subsequent to the year 1871 federal law in relation to the plaintiff has been structured upon the demonstrably false premise that the *Appropriations Act* repealed international and constitutional rights, the consequence of which *faux* repeal arguably has been and continues to be "*genocide*" of the plaintiff's constituents.

The plaintiff wishes to stress to the Court that it does not seek to have its cake and eat it too: it does not seek, and will not accept, benefits and programs under federal law as a dependent Indian community, while at the same time seeking to assert a measure of independence as a domestic dependent nation. Nor does the plaintiff wish to caste aspersions or gain compensation for genocide of the past—the objective here is the rehabilitation of the rule of law for the sake of the lands, waters and people of all races and ethnic backgrounds in the Hudson valley of America—for the future.

Finally, plaintiff has only to add, in the alternative, that even if the idea of Congressional "*plenary*" jurisdiction were capable of co-existing with the idea of constitutionally entrenched aboriginal rights on yet-unceded territory, the proposition that any particular set of such aboriginal rights, once vested, subsequently has been revoked by an act of Congress, would have to be supported by a clearly and plainly expressed Congressional legislative intent to repeal the particularly vested aboriginal rights in question. No such act of Congress exists, even arguably, relative to the *sui generis* aboriginal rights peculiarly vested in the plaintiff in consequence specifically of the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut*.

RELIEF REQUESTED

Wherefore plaintiff respectfully asks the Court:

(*a*) to accept original jurisdiction; and

(*b*) to exercise such jurisdiction specifically by declaring that:

(*i*) the *Constitution, 1789* is without prejudice to the plaintiff's previously established legal remedy of third-party adjudication under the *Order in Council (Great Britain) of 9 March 1704* in the matter of *Mohegan Indians v. Connecticut* relative to the resolution of the outstanding conflicting claims to jurisdiction, between the plaintiff on the one hand and the three defendants on the other hand in and over the Hudson River drainage basin in New York State; and

(*ii*) the President still has jurisdiction under Section 2.2 of Article II of the *Constitution* to enter into a treaty with the plaintiff notwithstanding the *Appropriations Act of 1871*.

October 20, 1997.

WESTERN MOHEGAN TRIBE & NATION OF NEW YORK
By:

RONALD ROBERTS
Sachem

BRUCE CLARK, LLB, MA, PhD
Attorney General

LEON GREENBERG
Counsel of Record

TO:

JOSEPH L. YANNOTTI
Assistant Attorney General, New Jersey
25 Market Street, CN 112
Trenton, NJ 08625 (609) 292-8567 Fax 777-3120

JUDITH KRAMER
Assistant Attorney General, New York
24th Floor, 120 Broadway Avenue
New York, NY 10271 (212) 416-8603 Fax 416-6009

CRAIG ALEXANDER
Assistant Attorney General, United States
Office of Tribal Justice, Department of Justice
Room 1509
950 Pennsylvania Avenue NW
Washington, DC 20530—0001
Telephone (202) 514-9080 Fax (202) 514-9078